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UNCLAS SECTION 01 OF 07 HANOI 000451

SIPDIS

SENSITIVE

STATE FOR EB/IPE AND EAP/BCLTV  
STATE ALSO PASS USTR BURCKY/ALVAREZ AND BRYAN  
STATE ALSO PASS USPTO FOR URBAN  
STATE ALSO PASS LIBRARY OF CONGRESS FOR TEPP  
USDA FOR FAS/FAA/AO HUETE  
USDOC FOR 4431/MAC/AP/OPB/VLC/HPPHO

E.O. 12958: N/A

TAGS: [KIPR](#) [ETRD](#) [ECON](#) [VM](#) [IPROP](#) [BTA](#) [WTO](#)

SUBJECT: VIETNAM: EMBASSY INPUT FOR 2005 SPECIAL 301 REVIEW

SENSITIVE BUT UNCLASSIFIED; PROTECT ACCORDINGLY

REF: STATE 23950

[1](#)1. (SBU) Summary: Embassy recommends continued placement of Vietnam on USTR's Special 301 Watch List for 2004. Enforcement of IPR in Vietnam remains weak and IPR violations are rampant. We do not believe elevation to the Priority Watch List is warranted, however, as:

-- Vietnam continued to make some progress in strengthening its IPR legal regime in 2004 and is on track to promulgate a new comprehensive law on intellectual property in 2005.

-- The Government of Vietnam (GVN) maintains a high-level public commitment to IPR protection and works closely with international donors, including the USAID-funded Support for Trade Acceleration (STAR) project.

-- The U.S.-Vietnam Bilateral Trade Agreement (BTA) with its major provisions on IPR, codifies Vietnam's commitment to make its IPR regime TRIPs-consistent. Vietnam has also committed to adhere to TRIPs upon accession to the WTO.

-- The size of the market for U.S. intellectual property products in Vietnam, though growing, remains small, given Vietnam's low GDP per capita. End Summary.

Continued Placement on Special 301 Watch List Warranted  
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[1](#)2. (SBU) Embassy recommends that USTR keep Vietnam on its Special 301 "Watch List" for the coming year because IPR piracy and counterfeiting in many product categories remains rampant and enforcement is weak. Additionally, Vietnam has not met all of the IPR commitments included in Chapter Two of the BTA, which were due to be implemented no later than December 10, 2003. Finally, market access barriers, especially censorship of "cultural products" continue to impede the availability of legitimate products, further complicating efforts to combat piracy.

BTA - Strong IPR Commitments, but Lagging Implementation  
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[1](#)3. (U) Chapter Two of the BTA, which entered into force on December 10, 2001, codifies Vietnam's commitment to bring its IPR legal regime and enforcement practices up to international standards by December 2003, to protect IP consistent with WTO TRIPs standards, and in some cases, to provide protection stronger than TRIPs. The BTA covers the fields of copyright and related rights, encrypted satellite signals, trademarks (including well-known marks), patents, layout designs of integrated circuits, trade secrets, industrial designs and plant varieties.

[1](#)4. (SBU) The GVN is lagging in implementing its IPR obligations, particularly those related to enforcement. The BTA obligates Vietnam to provide expeditious remedies to prevent and deter infringement, to allow prompt and effective provisional measures, and to put in place criminal procedures and penalties for willful trademark counterfeiting or infringement of copyrights or neighboring rights on a commercial scale. Vietnam also committed, upon entry into force of the BTA, to enforce existing laws, the U.S.-Vietnam Copyright Agreement and the Paris Convention. No such routine and reliable enforcement exists. Additionally, Vietnam committed to accede to several international intellectual property conventions "promptly." Vietnam acceded to the Berne Convention on October 26, 2004. However, Vietnam has not yet submitted its applications to the Geneva Convention (phonograms) or the Brussels Convention (satellite signals). According to the National Office of Intellectual Property (NOIP), the GVN plans to complete application procedures for joining the Geneva Convention, the Brussels Convention, the Rome Convention for the Protection of Performers, Producers of Phonograms and

Broadcasting Organizations and the International Union for the Protection of New Varieties of Plants (UPOV) in 2005.

#### Improvements in IPR Laws Continue

15. (U) Vietnam has made significant progress over the past few years in establishing the legal framework for IPR protection. The GVN issued the following legal and regulatory IPR-related reforms in 2004:

-- On April 5, the Standing Committee of the National Assembly issued Ordinance No. 15/2004/PL-UBTVQH11 on plant varieties. This Ordinance upgraded provisions on IPR protection for plant varieties to meet the requirements of the UPOV Convention.

-- On June 7, the President issued Resolution No. 332/2004/QĐ-CTN on adhering to the Berne Convention on Copyright Protection for Literary and Artistic Works.

-- On June 15, the National Assembly passed a Civil Procedure Code (CPC). The CPC, which went into effect on January 1, 2005, regulates resolution of civil cases including IPR-related cases.

-- On July 14, the Ministry of Science and Technology (MOST) issued Instruction No. 18/2004/CT-BKHCN on strengthening IPR enforcement and oversight of the quality of domestic, import and export goods. The Instruction requires inspectors to monitor and resolve administrative breaches of IP rights.

-- On August 3, 2004 the Office of the Government issued Official Letter No.3985/VPCP-KG containing the Prime Minister's approval for MOST to draft new IPR and technology transfer laws.

-- On October 10, the Government issued Decree No.175/2004/ND-CP on violations and administrative sanctions in the trade domain. Articles 18 and 19 of this decree detail sanctions for trading in fake goods, stamps, labels and packages and establish procedures for assessing fines for these acts. These articles also provide for additional measures such as seizure of equipment used for infringement; destruction of counterfeit goods; and, confiscation of illegal profit.

-- On December 3, the National Assembly passed the Law on Publishing. The law was announced by the President under Resolution No. 26/2004/L/CTN on December 14 and will come into effect on July 1, 2005. The law requires the state to develop policies that both stimulate and develop the publishing sector. It also requests the State to help in the purchase of copyrights of valuable domestic and foreign works.

-- On December 29, MOST and the Ministry of Finance (MOF) issued Inter-Ministerial circular No.129/2004/TTLT/BTC-BKHCN on border control measures for industrial property of import and export goods. This circular authorizes IP rights holders and their representatives to file petitions for applying border control measures for IP if they find evidence of infringement.

-- On December 31, MOF issued Circular 132/2004/TT-BTC providing guidelines for the collection, payment, control and utilization of industrial property fees and charges. The Circular established one set of fees and charges for IP protection and services for all Vietnamese and foreign entities and individuals. Circular 132 replaced a May 1997 circular, which applied a two-tier price structure for IP fees and charges to Vietnamese and foreign applicants.

-- On January 5, 2005 the Ministry of Home Affairs issued Decision No.12/2005/QĐ-BNV on establishment of the Vietnam Anti-Counterfeit and Intellectual Property Protection Association (VACIP) of foreign-invested enterprises.

#### New Legislation to be adopted in 2005

16. (U) The NOIP has the lead on drafting a new comprehensive IPR law for Vietnam. This new law should help to consolidate Vietnam's existing IPR regulations. The law should also address shortcomings of the current legal framework including: lack of provisions for remedies, inconsistencies with the Berne Convention, and lack of reference to new media such as the Internet. NOIP is working with the Vietnam Office of Literary and Artistic Copyright and the Ministry of Agriculture and Rural Development on the draft law. NOIP plans to submit a draft to the Standing Committee of the National Assembly and to the public for comment in March. The law is on the National Assembly legislative calendar for review in May and approval in November.

17. (U) Two draft regulations have been submitted to the Minister of Science and Technology for approval:

-- A draft Circular implementing Decree No.42/2003/ND-CP on Industrial Property Protection for Layout Design of Integrated Circuits

-- A draft Circular implementing Decree 54/2000/ND-CP on the Protection of IPR to Business Secrets, Geographical Indications, Commercial Names and the Protection against Unfair Competition.

18. (U) MOST and MOF have submitted amendments to a 1999 Decree (No. 12/1999-ND-CP) dealing with administrative sanctions against industrial property violations to the office of the Government for approval. The proposed revisions seek to more clearly define IPR violations, increase the level of punishment and fines for violators, and reduce the overlapping functions of IPR enforcement agencies. The revisions also seek to provide more specific criteria for use of administrative measures with the goal of reducing the use of administrative measures as a substitute for civil proceedings.

#### Piracy Still Rampant

19. (U) The GVN has made little, if any, progress on reducing the amount of counterfeit and pirated goods available in Vietnam. Hanoi, HCMC and most other major cities in Vietnam are rife with music CD, VCD and DVD and video shops, with 100 percent of the U.S. product on sale or for rent pirated. Trademark violations are also prevalent, with all types of clothing and other items carrying unlicensed versions of famous trademarks available at shops of all sizes, including large state-owned stores, throughout the major cities.

110. (SBU) State-owned television and cable stations occasionally show unlicensed U.S. films on local television and cable channels. Some of these films are "borrowed" from legitimately licensed channels (such as HBO and Star Movies, which do not allow dubbing) and dubbed in Vietnamese for widespread viewing. Public cinemas as well as private cafes sporadically show pirated films. On a number of occasions, films that have been banned from import by censorship authorities have subsequently appeared for sale in pirated DVD form in the market.

111. (U) Software industry representatives estimate that piracy rates in Vietnam are upwards of 92 percent. American software companies such as Microsoft have had little success in creating a market for their legitimate product, despite efforts to cooperate with enforcement authorities and multiple years of commercial presence in Hanoi. Anecdotal evidence and industry sources suggest that GVN agencies use mostly pirated software on PC's in government offices. However, Microsoft experienced an estimated forty percent growth in its sales to government agencies and state-owned enterprises in Vietnam this year.

112. (U) Software piracy is also a strong disincentive for local software developers. Most companies choose to sell their products only as packages bundled with hardware because stand-alone software is easily and quickly copied and sold on the local market.

#### Enforcement Remains Weak

113. (SBU) The organizational structure of GVN IPR agencies remains complicated and bureaucratic, a fact acknowledged by GVN officials at all levels. Multiple agencies are tasked with overlapping functions or gaps are left in coverage. Institutional experience on IPR enforcement is extremely low. Government IPR agencies focus primarily on "administrative" enforcement of IPR laws, and are mostly limited to issuing administrative findings and occasionally issuing warnings either by letter or orally to small retailers of pirated material. Currently there are no procedures in place to provide recourse or compensation to rights holders whose rights have been violated.

114. (SBU) There are efforts underway to enhance the role of various IPR enforcement agencies. The Economic Police Department (EP) of the Ministry of Public Security has proposed establishment of an Anti-IPR Crime Section (also known as "Section Seven.") The proposal is pending approval of the Minister. In addition, on July 14, MOST established a Task Force on IPR Enforcement and Quality Control. The Task Force is chaired at the vice minister level and is responsible for overseeing efforts related to IPR enforcement and quality control, making proposals for activities on IPR enforcement and quality control and coordinating efforts with other concerned agencies.

115. (U) Vietnam's agencies do engage in enforcement

campaigns that target unlicensed goods, including those involving copyright and trademark violations, but also those with "illicit or pornographic content" and cases involving food and drug safety. The Ministry of Culture and Information (MOCI) reported that in the first eleven months of 2004 its inspectors carried out 31,673 surprise inspections (an increase of more than 12,000 over 2003). MOCI inspectors collected fines of ten billion Vietnamese Dong (VND) (about USD 630,000) in 2004 and forwarded documents for criminal prosecution in ten cases. MOST fined 20 individuals and organizations, of which, 13 cases were assessed a monetary penalty of VND 112 million (about USD 7,000). NOIP assisted in addressing 404 industrial property violations. According to news reports, the EP discovered at least USD 12.6 million worth of pirated and counterfeit goods during the first six months of 2004.

16. (SBU) In 2004, the Market Management Bureau (MMB), an enforcement agency within the Ministry of Trade, executed raids on 94 businesses (80 retailers and 14 factories) selling counterfeit Nike products in Hanoi and Ho Chi Minh City (HCMC). MMB officials seized footwear, apparel and equipment. Businesses were fined USD 800 on average. Nike plans to continue to work with the MMB on enforcement issues.

17. (SBU) In May 2004, joint EP and MMB teams raided three computer companies in Hanoi. Each company was fined more than USD 8,000 for using pirated versions of Microsoft's operating system, Lac Viet dictionary and Norton anti-virus programs. After the raids, the head of the MMB asserted, "the raids were the start of a nationwide campaign to protect the IPR of software companies." In November 2004, inspectors from Ministry of Culture and Information (MOCI), MOST and the EP jointly raided two large computer suppliers in HCMC. Each company was fined USD 2,000. Enforcement agencies removed illegal software programs installed on 30 computers including Microsoft Windows, Microsoft Office, Vietkey 2000, Adobe Photoshop, ACD See and CorelDraw, with an estimated value of USD 10,000. In addition, they confiscated 40 CD-ROMs containing unlicensed software programs.

#### Lack of Availability of Legitimate Products

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18. (U) Given the relative poverty of Vietnam, with an average per capita GDP of around 552 dollars (2004), the size of the market for U.S. IP product remains fairly small. While losses to piracy are as high as 100 percent in some sectors, the dollar value remains a small fraction of losses faced by U.S. IPR-related companies in the rest of the region. In addition, some types of products, such as those deemed "cultural products," are still subject to censorship and control regulations that impede market access. That said, Vietnam's economy has much potential and, with a well-educated population of over 82 million, it will eventually become one of the major economies in the region.

#### Growing Domestic Awareness

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19. (SBU) Public and private awareness of the value of IPR protection for Vietnamese products both in Vietnam and abroad continue to grow. In 2004, several new organizations focused on IPR were established in Vietnam.

-- On August 25, 2004 the Ministry of Home Affairs approved the establishment of the Vietnam Literature Copyright Centre (VLCC). VLCC is a non-governmental and non-profit organization under the management of Vietnam Writers' Association. VLCC's stated purpose is to execute the contracts on copyright transfer between the Center and authors; to help settle disputes among members; and, to coordinate with relevant international organizations in protecting literary copyright. VLCC also disseminates copies of laws, regulations and international conventions on copyright for literary works to its members, writers and the general public. At present, about 100 writers have signed contracts with the Center. The Center has asked the U.S.'s William Joiner Center to act as an intermediary between the Vietnam Writers' Association and American writers, whose books are published by the Association's publishing house in Vietnam.

-- After more than two years wait, the Ministry of Home Affairs approved the establishment of the Vietnam Anti-Counterfeit and Intellectual Property Protection Association of foreign-invested enterprises (VACIP) on January 05, 2005. VACIP is the first anti-counterfeit association for foreign invested enterprises in Vietnam and is modeled on the Quality Brands Protection Committee (QBPC) in China. It will function under the supervision of the Ministry of Planning and Investment. Baker & McKenzie drafted the charter of this organization and, to date, Nike, Unilever, Glaxo Smith Kline, Proctor & Gamble and Ajinomoto have joined. The association will represent member companies in

the effort to fight against counterfeit goods in Vietnam; protect the rights of members; provide training to consumers, government officials and enforcement agencies; and, work with GVN on new IP policies.

120. (U) In September, MOST and the Ministry of Culture and Information (MOCI) hosted Vietnam's first national conference on IPR with participation of Deputy Prime Minister Vu Khoan. Representatives of 28 diplomatic missions and international organizations and 500 representatives from the GVN and local businesses attended. In his remarks, DPM Khoan acknowledged GVN failure to adequately enforce existing IPR regulations; warned lack of effective IPR protection will stifle creativeness of Vietnamese creators and inhibit foreign investment; and, noted the importance of effective IPR enforcement as part of Vietnam's efforts to join the WTO.

121. (U) In October 2004, HCMC government agencies responsible for IPR hosted an Exhibition on Anti-Counterfeit Technologies and Protection of Prestige and Quality Trademarks. The exhibition featured a dialogue with private business on counterfeiting and IP challenges faced by businesses in HCMC. During the dialogue, businesses raised the most problematic issues seen in IPR enforcement: inadequate financial and human resources for government enforcement agencies; weak coordination between IPR holders, government enforcement agencies and consumers; lack of clear direction on how businesses can coordinate with, and make contributions to, HCMC's efforts in combating IPR infringements; overlapping functions among government enforcement agencies that delay decisions and actions on violations; and, low penalties for IPR violators.

122. (U) Businesses participating in the dialogue proposed creation of an "Anti-Counterfeit Fund." Businesses pointed out that since IPR enforcement officials do not have sufficient resources, many companies would be willing to make contributions to an Anti-Counterfeit Fund to assist IPR enforcement officials. In return, businesses would contribute industry knowledge and work directly with relevant government agencies to strengthen IPR enforcement. The HCMC government asked three participants representing Honda, the Recording Association of Vietnam, and Tribeco (a local soft drink company) to submit a proposal for the Anti-Counterfeit Fund to the People's Committee. For the first year, the pilot program would focus on IP violations of motorcycle spare parts, soft drinks, CDs and DVDs. The proposal for the Anti-Counterfeit Fund has been submitted to the HCMC People's Committee and is currently under review.

#### Technical Assistance helps Build Enforcement Capacity -----

123. (U) In 2004 Vietnam continued receiving considerable IPR-related technical assistance from a number of foreign donors and NGO's as well as multiple USG agencies. This assistance included conferences, seminars, training and review of draft pieces of legislation. In 2005, the USAID-funded Support for Trade Acceleration (STAR) project plans to provide the following IPR-related technical assistance to the GVN:

-- STAR will support efforts by the HCMC Department of Science and Technology develop an anti-counterfeiting campaign in HCMC aimed at improving coordination among IPR enforcement agencies and increasing public awareness.

--STAR will support efforts by the Supreme People's Court to develop implementing regulations for the new Civil Procedure Code, focusing primarily on provisional measures.

-- STAR will help the Economic Police finalize a new textbook for IPR enforcement as well as case studies for use as the police academy.

-- STAR will support Ministry of Justice efforts to develop a new law on judgment enforcement to replace the current ordinance governing this issue.

--STAR will support GVN efforts to draft regulations on optical disk production and distribution.

-- STAR will support a three-week training program for 25 Vietnamese judges on IP law and adjudicating IP cases.

-- STAR will provide training to GVN Customs officials on implementing new IP border measures.

#### ----- Conclusion and Recommendation -----

124. (SBU) Vietnam will remain a market in which IPR violations are of concern for at least the foreseeable future. The BTA and Vietnam's efforts to accede to the WTO

provide us with strong tools for engaging the GVN on IPR enforcement. U.S. policy should continue to work toward ensuring Vietnam's commitments are translated into good law and regulation in the near term as well as effective enforcement. The USG should continue to support USG funding for technical assistance in IPR, particularly with respect to building capacity for IPR enforcement in Vietnam's law enforcement and judicial agencies. At the same time, Mission will continue to press GVN officials at every level to address IPR piracy and counterfeiting problems throughout Vietnam.

125. (SBU) RECOMMENDATION: The Mission believes it is important to maintain consistent pressure on Vietnam to protect IPR. For that reason, we recommend USTR maintain Vietnam on the Special 301 Watch List in 2005. We do not believe elevation to the Priority Watch List is warranted, however, as:

-- Vietnam continued to make some progress in strengthening its IPR legal regime in 2004 and is on track to promulgate a new comprehensive law on intellectual property in 2005.

-- The Government of Vietnam (GVN) maintains a high-level public commitment to IPR protection and works closely with international donors, including the USAID-funded Support for Trade Acceleration (STAR) project.

-- The U.S.-Vietnam Bilateral Trade Agreement (BTA) with its major provisions on IPR, codifies Vietnam's commitment to make its IPR regime TRIPs-consistent. Vietnam has also committed to adhere to TRIPs upon accession to the WTO.

-- The size of the market for U.S. intellectual property products in Vietnam, though growing, remains small, given Vietnam's low GDP per capita.

MARINE